FILE COPY

FILED
JAN 30 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 683

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE
STATE OF NEW YORK,

Respondent.

JURISDICTIONAL STATEMENT

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

FRANCIS G. HESSNEY,
Attorney for Appellant,
74 South Main Street,
Canandaigua, New York.

BATAVIA TIMES LAW PRINTERS
BATAVIA, N. Y.

INDEX.

	PAGE
Introductory Paragraph	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	4
State Statutes Involved	5
Questions Presented	6
Statement of the Case	9
The Questions Presented are Substantial	12
Conclusion	18
Appendix "A"	20
Appendix "B"	27
Appendix "C"	31
Appendix "D"	40
Appendix "E"	43
Appendix "F"	45
Appendix "G"	49

Citations.

Cases:

Carlisle v. Bennett, 268 N. Y. 212, 217 14

Citizens to Protect Public Funds, *et al.* v. Board of Education of Parsippany Troy Hills Township, 98 Atlantic 2d 673 16

Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 17

Crowell v. Benson, 285 U. S. 22 at 57, 52 S. Ct. 285, 76 L. Ed. 598 17

Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. Ed. 616 13

Ellis v. Allen, 4 A. D. 2d 343 (Third Dept., July, 1957) 17

PAGE

Ellis v. Dixon, 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231 4
Hagar v. Reclamation District No. 108, 111 U. S. 701, 712; 4 S. Ct. 663; 28 L. Ed. 569 12
Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88, 93; 33 S. Ct. 185 ..16, 17
Joint Anti-Fascist Refuge Committee v. McGrath, 341 U. S. 123, 136; 71 S. Ct. 624, 630; 95 L. Ed. 817 16
Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U. S. 329 15
Matthews v. Hehe, 269 U. S. 262, 46 S. Ct. 108, 70 L. Ed. 266 4
Morgan v. The United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 16
Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 70 S. Ct. 652 17
N. Y. Water Service Corp. v. Water P. & C. Comm. 283 N. Y. 23, 130 16
O'Brien, Matter of, 4 N. Y. 2d 140 18
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 17
Pope v. U. S., 323 U. S. 1 16
Railroad Tax Cases, 13 Fed. 722, 752 (error dismissed 116 U. S. 138; 6 S. Ct. 317; 29 L. Ed. 589) 13
Ross v. Wilson, 308 N. Y. 605, Ct. of App. June, 1955 .. 14
Saginaw Broadcasting Co. v. F. C. C., 96 Fed. 2 554 ... 16
Stewart v. Palmer, 74 N. Y. 183, 188 12
St. Joseph Stock Yard Co. v. United States, 298 U. S. 38, at 51-53, 56 S. Ct. 720, 80 L. Ed. 1033 17
U. S. v. Baltimore & Ohio R. Co., 293 U. S. 454 16
Wilson v. Folsom, 151 F. Supp. 195 15
Youngstown County v. Sawyer, 343 U. S. 759 14

STATUTES.

XIV Amendment to the United States Constitution ..4, 6, 7, 8, 12, 13
Civil Practice Act of the State of New York, Article 78 ..... 2, 11, 18
Section 1295 ..... 17, 23
Section 1296 24
Education Law:
Section 310 ..... 5, 18, 20

PAGE

Section 311 ..... 5, 20
Section 2034 ..... 5, 21
Section 2037 ..... 5, 18, 20
Election Law:
Section 261 ..... 5, 21
Section 263 ..... 5, 22
Gilbert Bliss Civil Practice of New York, Vol. 6-b page 104 ..... 6, 23
Gilbert Bliss Civil Practice of New York, Vol. 6-b page 109 6
Rule 18 of the Rules and Practice of the Commissioner of Education 5, 22

MISCELLANEOUS.

Judicial Review of Administrative Adjudicatory Action taken without a Hearing, 70 Harvard L. Rev. 698 at 700-701 17
Ohlinger's Federal Practice, Revised Edition, Volume 1, 28:1257 (2.3), page 502 4

IN THE

Supreme Court of the United States

No. .....

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

JURISDICTIONAL STATEMENT

1. Introductory Paragraph

The appellant, Reginald Lush, is appealing from an order of the Court of Appeals dated October 22, 1959, entered in the office of the Clerk of the Supreme Court in Albany County on November 5, 1959, upon a remittitur from the Court of Appeals which said order dismissed an appeal to the Court of Appeals "on the ground that no substantial constitutional question is directly involved."

2. Citations to Opinions Below.

Opinions rendered in action and citations to all reported proceedings are listed in chronological order of development as follows:

Opinion, Commissioner of Education (March 27, 1957), State Dept. Reports ; Appendix "B";

Opinion (Memorandum) Supreme Court, per Hamm, J. (October 8, 1957). 16 M. 2d 137, 185 N. Y. S. 2d 195. Set forth in Appendix "C";

Opinions, Appellate Division, 3d Dept. (April 23, 1959, April 29, 1959), 8 A. D. 2d 644, 678; 185 N. Y. S. 2d 202. Set forth in Appendix "D";

Opinion, Court of Appeals, (October 22, 1959), 7 N. Y. 2d 745; 193 N. Y. S. 2d 653. See Appendix "E";

Motion for re-argument and leave to appeal to the Court of Appeals denied by Appellate Division, 3d Dept. (January 4, 1960), 10 A. D. 2d 586; 195 N. Y. S. 2d 627. Appendix "F";

Motion denied by Court of Appeals (April 1, 1960), entered in Albany County Clerk's office (April 21, 1960), N. Y. [redacted] Appendix "G";

3. Jurisdiction.

(A) The suit herein is a proceeding instituted under Article 78 of the Civil Practice Act of the State of New York to review the decision and order of the Commissioner of Education, holding valid a special election held by the Board of Education of the Central School District No. 1, Towns of Manchester, Farmington, and Hopewell in the County of Ontario and State of New York.

(B) The appellant seeks to review the order of the Court of Appeals which dismissed an appeal taken to that court "on the ground that no substantial constitutional question is directly involved." The aforesaid order

is dated October 27, 1959 and was filed in the office of the clerk of Albany County on the 5th day of November, 1959; which order is set forth in Appendix "D".

Following the entry of the Court of Appeals dismissing the appeal taken as of right, the appellant duly and timely sought leave to the Appellate Division, Third Judicial Department, to re-argue the appeal in that court or, in the alternative, for leave to appeal to the Court of Appeals. The Appellate Division, Third Department, denied said motions in an order to that effect entered in the office of the Clerk of Albany County on the 3rd day of February, 1960.

The appellant then duly and timely sought leave to appeal to the Court of Appeals from the Court of Appeals which said leave was denied by the Court of Appeals by order entered in the office of the Clerk of Albany County on the 21st day of April, 1960. A copy of the order with notice of entry was served upon the appellant on April 22, 1960.

Notice of appeal to the Supreme Court of the United States was duly and timely filed with the Clerks of the Court of Appeals, Appellate Division, Third Judicial Department, and the Supreme Court of Albany County on June 27, 1960, following the denial by the Court of Appeals of the motion for leave to appeal. These motions and leave to appeal to the Appellate Division and then to the Court of Appeals tolled the three months' period. By three orders, the first entered on August 15, 1960, the second entered on September 19, 1960, and the third entered on November 17, 1960, the time for docketing this appeal was extended to February 1, 1961.

(C) The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U. S. C., § 1257, Subdivision (2).

(D) Authority which sustains the jurisdiction of the Supreme Court of the United States is:

(1) 28 U. S. C., § 1257, Subdivision (2);

(2) Mathews v. Huwe, 269 U. S. 262, 46 S. Ct. 108, 70 L. Ed. 266;

(3) Ohlinger's Federal Practice, Revised Edition, Volume 1, 28:1257 (2.3), page 502;

(4) Ellis v. Dixon, 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231.

4. Constitutional Provisions Involved.

The constitutional provisions involved are:

(a) Section 1 of the Fourteenth Amendment to the Constitution of the United States.

THE CONSTITUTION OF THE STATE OF NEW YORK:

Art. I, Sec. 1—RIGHTS, PRIVILEGES AND FRANCHISE SECURED.

"No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law."

Art. I, Sec. 6—Grand Jury: Protection of Certain Enumerated Rights; Waiver of Immunity by Public Officers Required.

"• • • No person shall be deprived of life, liberty or property without due process of law."

Art. I, Sec. 11—Equal Protection of Laws; Discrimination in Civil Rights Prohibited.

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. • • •"

5. The Statutes Involved.

There are involved in this action the following statutes of the State of New York and the following Rules of the Commissioner of Education of the State of New York:

§ 310 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, page 166;

§ 311 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, page 193;

§ 2034 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, page 646;

§ 2037 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, page 653;

§ 261 of the Election Law, McKinney's Consolidated Laws of New York, Book 17, page 434;

§ 263 of the Election Law, McKinney's Consolidated Laws of New York, Book 17, page 437;

Rule 18 of the Rules and Practice of the Commissioner of Education, Handbook 1 (1955), page 19;

§ 1295, Gilbert Bliss Civil Practice of New York, Vol. 6-b page 104;

§ 1296, Gilbert Bliss Civil Practice of New York, Vol. 6-b page 109;

all of which are set forth in Appendage "A" hereto.

6. Questions Presented.

1. Did the Court of Appeals of the State of New York err in holding and deciding that the failure to resolve the material issues of fact relative to the functioning of the voting machines, the improper counting of the votes, the subsequent destruction of the votes, contrary to statutory provisions made and provided for, did not constitute a deprivation of appellant's property without due process of law and did not deny to appellant the equal protection of the laws within the meaning of Section 1, Article XIV of the Amendments to the Constitution of the United States of America?

2. Did the Court of Appeals of the State of New York err in holding and deciding that the proven material misrepresentations of the taxing proposition to the public, the failure to hold any public meetings so that voters could know the truth, did not constitute a deprivation of appellant's property without due process of law and did not deny to appellant the equal protection of the laws within the meaning of Section 1, Article XIV of the Amendments to the Constitution of the United States of America?

3. Did the Court of Appeals of the State of New York err in holding and deciding that the failure to produce the registration books demanded by the appellant, the "freezing out" of one side in a school election, contrary to such statutes made and provided for, the failure to permit

properly registered voters in general elections to vote in the school election, when school authorities used the procedures of general election to confuse the people, did not constitute a deprivation of appellant's property without due process of law and did not deny to appellant the equal protection of the laws within the meaning of Section 1, Article XIV of the Amendments to the Constitution of the United States of America?

4. Did the Court of Appeals of the State of New York err in holding and deciding that the Commissioner of Education's staff could inform one party of the controversy to proceed with affirmative action (the selling of bonds) and inform that party the Commissioner's decision before any hearing was held, and any evidence was allowed or could be produced, did not constitute a deprivation of appellant's property without due process of law and did not deny to appellant the equal protection of the laws within the meaning of Section 1, Article XIV of the Amendments to the Constitution of the United States of America?

5. Is it a denial to the appellant-taxpayer of due process of law and equal protection of the law within the meaning of Section 1, Article XIV of the Amendments to the Constitution of the United States of America for the courts of the State of New York in a proceeding to seek to review a judicial proceeding of the Commissioner of Education to ignore the prejudice and bias shown by the administrative officer and to determine whether there was any evidence to support the decision of the Commissioner?

6. Did the Court of Appeals of the State of New York err in holding and deciding that the legislature of the State of New York could properly delegate to the Commissioner of Education the judicial power of deciding a controversy arising out of a school district election which involved dis-

puted material issues of fact without requiring the Commissioner to afford the appellant the right to present evidence, the right to secure the testimony of adverse witnesses, the right to meet the claims of opposing parties, the right to cross examination of witnesses, and that such delegation to the Commissioner of Education did not constitute a deprivation of appellant's property without due process of law and did not deny to appellant the equal protection of the laws within the meaning of Section 1, Article XIV of the Amendments to the Constitution of the United States of America?

7. Is it a violation of procedural due process contrary to the Fourteenth Amendment of the United States Constitution for the courts of the State of New York in a proceeding seeking to judicially review a decision of the Commissioner of Education made without a fair and open hearing to make a determination without supporting findings of fact or conclusions of law where the Commissioner on the material issues states that he does not have any knowledge or information sufficient to form a belief as to those material facts?

8. Are there any constitutional limitations on the right of any state to delegate exclusively to any administrative agency the power to decide all disputes on taxing propositions voted upon by the taxpayers without conforming substantially to normal judicial procedures?

9. Did the Court of Appeals err in holding and deciding that the appeal before it did not present a substantial constitutional question directly involving the construction of the Constitution of the United States of America?

7. Statement of the Case.

On November 17, 1956, a special meeting of the voters of Central School District No. 1, Towns of Manchester, Farmington and Hopewell, Ontario County, New York, was held to vote on a proposition for the purchase of a site and for the erection of a junior-senior high school. The estimated cost of the new school was $1,350,000.

The vote was conducted by the use of two voting machines which were located in the gymnasium at the high school in the Village of Manchester.

At the conclusion of the vote the Board of Education's election officials stated that the total number of votes cast was 1,193; that there were 597 "yes" votes, 550 "no" votes, 45 blank votes and one void vote.

The election was declared to have been carried in favor of the submitted proposition by a majority of one and a plurality of 47 votes.

Prior to the election, the State Education Department had made a survey of our school building needs. The state officials recommended that an elementary school was our most important building need. Instead of accepting this recommendation, the school board suppressed it and then proceeded to create the impression to the public that the state recommended the building of a junior-senior high school, the proposition in dispute.

The board then proceeded for almost two years prior to the actual vote on the proposition to refuse to hold a public meeting. The public could only secure its information by guess, by a few minor newspaper articles put out whenever the board felt like putting them out, and by issuing their own brochures just prior to the disputed vote. These brochures were misleading, slanted.

The school board never presented any opposition arguments in these brochures which were paid for by taxpayers' money.

Also prior to the election, the board instituted a system of personal registration. However, the people were led to believe that registration was permanent. The registration books contained over 280 names of people who were properly registered under the Election Law but were not supposedly properly registered under the Education Law. The appellant had requested, in his notice to produce, that these registration books be produced as evidence. This demand was not complied with. The Commissioner in his answer denied having any knowledge or information sufficient to form a belief as to whether a complete opportunity was given to the people to register. Two people stated they did not have an opportunity to register.

Confusion surrounding the registration procedure reached its climax at this election when 59 people presented themselves to vote under the belief that they were properly registered. Eleven of these 59 people were permitted to vote while the other 48 were denied that right. After the election, these 11 individuals were notified by the school board that they had improperly voted.

At the time of the election, the voting machines were completely under the control of the supporters of the Board of Education, whereas the Citizens Committee, the opponents of the board, were not permitted to have any members as inspectors of election or as members of the board of registration. Upon the reading of the election results the only person to go behind the machines was the chief inspector, Joan Mosher, an ardent supporter of the board, while no one of the petitioner's side had a chance to check the results.

Affidavits were produced of various voters stating that when they went to vote they had a great deal of difficulty in pushing the "no" lever down. The Commissioner made no finding of fact or conclusion of law in his decision relative to the functioning of the machines. It was also admitted by the chief inspector Joan Mosher that she permitted one person to vote a second time and under similar circumstances one voter was denied the right to vote the second time.

Shortly after the vote was taken the Commissioner was notified by letter and requested to impound the voting machines and preserve the votes according to law. The Commissioner of Education took no action. The votes were wiped off the machines and thus effectively destroyed.

Thereafter, during the month of January, the Board of Education proceeded with the advertising of the sale of the school bonds while the appeal was pending before the Commissioner of Education. It was alleged without dispute that the board was advised by certain State Education Department officials that the appeal pending before the Commissioner would be dismissed.

That oral argument was set and held on January 30, 1957, but the Commissioner refused to take testimony. That on the 27th day of March, 1957, the Commissioner dismissed the appeal of your petitioner and held the special election of November 17, 1956, valid.

Shortly thereafter under the provisions of Article 78 of the Civil Practice Act a proceeding was commenced by the appellant, Reginald Lush, to review the decision of the Commissioner.

That on or about October 8, 1957, the Honorable Herbert D. Hamm, Justice of the Supreme Court, issued a memorandum decision dismissing the petition.

That on or about October 31, 1957, an order dismissing the petition was subsequently made and filed.

Notice of appeal from an order made by the said Justice Hamm was duly served and filed on or about November 23, 1957.

The Appellate Division of the Supreme Court, Third Department, unanimously affirmed the order of Special Term on May 5, 1959.

Thereafter an appeal was taken on June 2, 1959, to the Court of Appeals upon constitutional grounds.

Upon a decision and order dated October 22, 1959, the Court of Appeals dismissed the appeal stating that "no substantial constitutional question is directly involved".

Thereafter motion for leave to appeal to the Court of Appeals was made to the Appellate Division, Third Department, which motion was denied in an order entered February 3, 1960.

Thereafter a motion was made to the Court of Appeals which motion was denied in an order entered April 21, 1960.

8. The Questions Presented are Substantial.

The levying of a tax upon appellant's property is protected by the "due process" clause of the Fourteenth Amendment to the United States Constitution.

The taxing proposition, voted upon by the electorate, called for an expenditure of $1,350,000 to be paid by a tax to be levied upon the taxable real property of the district. The constitutional right not to have real estate taken away improperly by the imposition of a tax for a school building is a property right protected by the "due process" clause.

Stewart v. Palmer, 74 N. Y. 183, 188;

Hagar v. Reclamation District No. 108, 111 U. S. 701, 712; 4 S. Ct. 663; 28 L. Ed. 569;

The Railroad Tax Cases, 13 Fed. 722, 752 (error dismissed 116 U. S. 138; 6 S. Ct. 317; 29 L. Ed. 589);

Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. Ed. 616;

The destruction of the votes and the other registration and voting irregularities invalidated the election and the approval thereof by the New York courts was a denial to the appellant of due process and equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution.

Once the taxing proposition was submitted to the electorate for their approval or rejection, it is then mandatory that that election be free and equal.

All elections, whether general, primary, or school, and whether conducted under the Election Law, primary or caucus regulations, or the Education Law, must meet one basic requirement—fairness.

It is unquestioned that the Citizens Committee who were led by the petitioner herein were frozen out completely from having any members on the board of registration, inspectors of election or registration clerks, contrary to the Election Law, Sections 164 and 223. It is submitted that this is more than simply dirty machine politics. Even in the worst wards and toughest city political organizations; *i.e.*, Jersey City, and Memphis, Tenn., the opposing side at least has a fair share of the election officials whether it does them any good or not. Why the same cannot be true in a school election is a question that cannot be arbitrarily ignored by the Commissioner of Education, as was done here.

The net result of this activity was that the reading of the back of the machines was done by one person only. No

one from the petitioner's group had an opportunity to check the results. Certainly, this is contrary to every precept of fairness in the conduct of any election. Yet even this was topped by the events that followed.

Within twenty-eight days and contrary to the Election Law and the Education Law of the State of New York with reference to the period in which ballots are supposed to be preserved, the votes on the voting machines were destroyed, despite every attempt of appellant to secure their impoundment and preservation, pending this appeal.

These facts are undisputed. Therefore, there was no legal election because there were no votes to count. Using the 1960 presidential election as an example, it is submitted that the defeated party which demanded a recanvass of the votes in Illinois, Texas, and other states, at least had the opportunity to recanvass the votes. They also had poll watchers. There would have been no official certification of the vote in Illinois, Texas or any other state unless those votes were available to be recounted. This is the minimum requirement. Here the Commissioner failed to consider the statutory provisions for the accurate preservation of the election results.

There must be substantial compliance with the forms of the law. "That the protection of the citizens' constitutional right is a court function and no public official or body is beyond the reach of that judicial power."

Youngstown County v. Sawyer, 343 U. S. 759.

See also:

Carlisle v. Bennett, 268 N. Y. 212, 217.

The condonation by the Commissioner and the New York State courts of these irregularities and violations was, in a legal sense, arbitrary and capricious. (Matter of Ross

v. Wilson, 308 N. Y. 605, Ct. of App. June, 1955. Opinion VanVoorhis at 617.)

"It has been said in Wilson v. Folsom, 151 F. Supp. 195, that unimpeached evidence as to facts may not be arbitrarily discredited. The failure of an administrative agency to consider evidence before it is arbitrary (Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U. S. 329).

In the instant case, the absence of findings of fact on the part of the Commissioner of Education is aggravated by the preceding fundamental failure on the part of the Commissioner to grant a hearing and receive evidence on disputed issues as to even provide a foundation for the findings of fact.

There was no constitutional fair hearing by the Commissioner. He had, or his authorized officials had, effectively made the decision in the original appeal before all of the evidence was in, as a result of two *ex parte* meetings which were admitted in the pleadings which had taken place between the Commissioner's subordinates and the Board of Education.

These admissions plus the failure to produce all the documents demanded in the Notice to Produce conclusively refutes the Commissioner's assertion that complete opportunity was given to present all the evidence. When we add to these facts the evidence of the Commissioner's failure to preserve or to take some action preventing the destruction of the evidence contained in the voting machines and the confusion surrounding the registration books, it becomes obvious that the petitioner's right under due process clause to have a fair and just hearing has been scorned.

Consequently, there was no findings of fact made and conclusions of law from which any appellate court could

intelligently determine whether the decision had any substantial support in the evidence.

N. Y. Water Service Corp. v. Water P. & C. Comm., 283 N. Y. 23, 130.

In Saginaw Broadcasting Co. v. F. C. C., 96 Fed. 2 554, the Court stated, "It is not the duty of the Court to make findings for the Commission and when the Commission has failed in its duty to make such findings, it is impossible for the Court to review its conclusions."

In U. S. v. Baltimore & Ohio R. Co., 293 U. S. 454, the Court held "This complete absence of the 'basic or essential findings required to support the Commission's order' renders it void".

These are triable issues which were fundamental and controlling. (See Citizens to Protect Public Funds, *et al.* v. Board of Education of Parsippany Troy Hills Township, 98 Atlantic 2d 673.)

In that case conduct far less partisan and censurable was rendered sufficient to invalidate a school district bond issue.

The Commissioner of Education was acting in a judicial capacity.

In the instant case the Commissioner was declaring fundamental property rights on supposedly existing facts. The exercise of the right to decide is a judicial action. The Court observed, Pope v. U. S., 323 U. S. 1, at page 23. "Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision." (See also Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 136; 71 S. Ct. 624, 630; 95 L. Ed. 817; and Morgan v. The United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129; and Interstate Commerce Commission v. Louisville and Nashville

R. R. Co., 227 U. S. 88, 93; 33 S. Ct. 185; 57 L. Ed. 431; and Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; and Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 70 S. Ct. 652.)

The courts did not attempt to seek a judicial review of the facts, did not attempt to direct a hearing to be held in accordance with New York Civil Practice Act No. 1295, providing for such instances in which the triable issues of fact could be resolved. Whether or not there was evidence to support the administrative determination is a question of law and must be open for consideration by the courts.

The evil of such practice of denying the Court's right to consider the *quantum* of evidence before the administrator was pointed out by Chief Justice Hughes in Crowell v. Benson, 285 U. S. 22 at 57, 52 S. Ct. 285, 76 L. Ed. 598, as follows:

> "That would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system wherever fundamental rights depend, as not infrequently they do depend, upon the facts and finality as to the facts becomes in effect finality in law."

St. Joseph Stock Yard Co. v. United States, 298 U. S. 38, at 51-53, 56 S. Ct. 720, 80 L. Ed. 1033;

Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88, 92, 33 S. Ct. 185, 57 L. Ed. 431;

Matter of Ellis v. Allen, 4 A. D. 2d 343 (Third Dept., July, 1957);

Judicial Review of administrative adjudicatory action taken without a hearing, 70 Harvard L. Rev. 698 at 700-701.

9. Conclusion.

The entire question of judicial review contained in sections 310 and 2037 of the Education Law has become so confused because the New York courts have failed (a) to follow the prohibition against judicial review contained in those two sections and (b) to follow procedures under Article 78 of The Civil Practice Act which is the only judicial review authorized by the legislature, but instead have invoked a new scope on this question of review by raising the confusing standard in the phrase, "purely arbitrary". (Matter of O'Brien, 4 N. Y. 2d 140.) The net result has been extreme confusion. Thus an important question is involved not only from the immediate party's interest, but with respect to taxpayers' rights relative to the power of the administrative officer to sanction election results without reasonable proof of the fairness and accuracy of the vote count to establish the will of the electorate.

Respectfully submitted,

FRANCIS G. HESSNEY,
Attorney for Appellant.
Office & P. O. Address,
74 South Main Street,
Canandaigua, New York.

Certificate of Service.

I hereby certify that copies of the aforegoing jurisdictional statement have been served by despositing the same in the United States mails, with first class postage prepaid, to the following counsel of record:

CHARLES A. BRIND, JR., ESQ.,
Attorney for the Commissioner of Education, Respondent,
State Education Building,
Albany, New York.

MAX G. MORRIS, ESQ.,
Attorney for the Board of Education, Intervenor-Respondent,
3 South Main Street,
Manchester, New York.

On this .... day of January, 1961.

FRANCIS G. HESSNEY.

APPENDIX "A".

Statutes Involved.

§ 310, Education Law, McKinney's Consolidated Laws of New York, Book 16, page 166 and the following:

"§ 310. Appeals or Petitions to Commissioner of Education and Other Proceedings.

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any act:

1. By any school district meeting. * * *

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

§ 311, Education Law, McKinney's Consolidated Laws of New York, Book 16, page 193:

"§ 311. Powers of Commissioner Upon Appeals or Petitions, *et cetera.*

The Commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein."

§ 2037, Education Law, McKinney's Consolidated Laws of New York, Book 16, page 653:

"§ 2037. Determination of Meeting or Election Disputes.

All disputes concerning the validity of any district meeting or election or of any of the acts of the officers

of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election. Formerly § 1735, renumbered 1736, L. 1952, c. 631, § 1; renumbered 2037 and amended L. 1953, c. 801, § 35, eff. June 1, 1953."

§ 2034, EDUCATION LAW, McKinney's Consolidated Laws of New York, Book 16, page 646:

"§ 2034. CANVASS OF VOTES; DECLARATION OF RESULT.

The ballot box or boxes, and the package of unused ballots, after being sealed by the inspectors of election, shall not thereafter be opened, except:

a. Upon the order of the commissioner of education in the manner specified in such order, or

6-b. When a period of six months from the date of the meeting or election has elapsed without any proceeding being commenced in regard to such meeting or election, the board of education may, notwithstanding any provision of this chapter or of the public officers law to the contrary, by written resolution order the unsealing and opening of the ballot box, or boxes, and the destruction of all ballots contained therein, together with the unused ballots."

§ 261, ELECTION LAW, McKinney's Consolidated Laws of of New York, Book 7, page 434:

"§ 261. CANVASS OF VOTE AND PROCLAMATION OF RESULTS.

The inspectors then shall open the counting compartments in the presence of the watchers and all other persons who may be lawfully within the polling place, giving full view of all the counter numbers.

Appendix "A".

The chairman of the board of inspectors shall, under the scrutiny of an inspector of a different political party, * * *

The vote as registered shall be entered on the statements of canvass in ink, by two inspectors of opposite political faith from each other, but not including the chairman, in the same order on the space which has the same designating number and letter, after which the figures shall be verified by being called off in the same manner from the counters of the machine by an inspector of opposite political faith from the chairman.

During such proclamation ample opportunity shall be given to any person lawfully present to compare the results so announced with the counter dials of the machine and any necessary corrections shall then and there be made by the board, after which the doors of the voting machine shall be closed and locked."

§ 263, Election Law, McKinney's Consolidated Laws of New York, Book 17, page 437:

"§ 263. Preservation of Ballots and of Record of the Machine.

The voting machine shall remain locked against voting for a period of thirty days and as much longer as may be necessary or advisable because of any existing or threatened contest over the result of the election, except as provided by section two hundred seventy-four and except that it may be opened and all the data and figures therein examined upon the order of any court or judge of competent jurisdiction."

Rule 18, Rules and Practice of the Commissioner of Education, Handbook 1 (1955), Page 19:

"18. Oral Argument; Briefs

a. Submission of appeals may be made upon the papers filed therein, with or without oral argument, or

the filing of briefs, as the Commissioner of Education, upon application, may determine.

b. Arguments in appeals pending before the Commissioner of Education may be held before the Deputy Commissioner of Education or the Counsel.

c. The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the Commissioner extends such time.

d. Oral argument is the opportunity for the parties to present orally the principal arguments in support of their positions and to establish the issues. Detailed arguments should not be presented at the time of oral argument, but may be presented in written form and opportunity will be given counsel for submission of briefs. Testimony is not taken and all necessary factual matter should be presented in affidavit form or in the form of exhibits."

§ 1295, GILBERT BLISS CIVIL PRACTICE ACT OF NEW YORK, VOL. 6-b, Page 104:

"§ 1295. HEARING UPON THE APPLICATION.

Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires. If a triable issue of fact is duly raised, it shall be forthwith tried before a court sitting without a jury, before a referee, or where the proceeding is to review a determination or to compel performance of a duty specifically enjoined by law and a jury trial is demanded on or before the return day, before a court and a jury. The provisions of statute or rule governing references in an action shall apply to the proceeding under this article.

In the case of proceedings instituted in the appellate division, the issue of fact shall be tried before a referee

or at a trial term of the supreme court in a county designated by the appellate division; and the verdict, report or decision rendered upon the trial shall be returned to, and the final order thereupon made by, the appellate division. In other cases, the place of trial shall be that named in the title of the proceeding, unless otherwise ordered by the court; and the court before which the trial is held shall have power to render the final order."

§ 1296, GILBERT BLISS CIVIL PRACTICE ACT OF NEW YORK, Vol. 6-b, Page 104:

"§ 1296. QUESTIONS FOR DETERMINATION; WHEN HEARING BEFORE APPELLATE DIVISION.

In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only:

1. Whether the respondent failed to perform a duty specifically enjoined upon him by law.

2. Whether the respondent, if a body or officer exercising judicial or quasi-judicial functions, is proceeding or is about to proceed without or in excess of jurisdiction.

3. Whether the respondent, if a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, had jurisdiction of the subject matter of a determination under review.

4. Whether the authority conferred upon the respondent in relation to that subject matter has been pursued in the mode required by law in order to authorize him to make the determination.

5. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner.

5-a. Whether the respondent abused his discretion in imposing the measure of punishment or penalty or discipline involved in the determination.

Where the determination under review was made as the result of a hearing held, and at which evidence was taken, pursuant to statutory direction, the following questions shall also be determined if the petitioner raises such questions:

6. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.

7. If there was such proof, whether, upon all the evidence, there was such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in any supreme court triable by a jury, would be set aside by the court as against the weight of evidence.

Where only one or more of the issues specified in subdivisions one to five-a inclusive, are raised, the court to which the application for relief is made shall itself dispose of the cause on the merits. Where one of the other two issues is raised the court shall make an order directing that the proceedings be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding is instituted. The court may, however, even in such a case, itself pass on objections to the petition in point of law, and it shall dismiss the proceeding on the merits where it appears that the petitioner is not entitled to relief because of the provisions of section twelve hundred and eighty-five or section twelve hundred and eighty-six of this article.

If the court erroneously decides that the issues in the cause are not such as to call for transfer of the cause to the appellate division, or if the converse occurs, the appellate division shall treat the cause,

when the latter comes before it by appeal or transfer, as if the proper proceedings had been taken, and shall either dispose of the issues itself, or if the papers before it are not sufficient therefor, shall remit the proceeding to the proper term or court to be disposed of.

Statements made in the answer are not conclusive upon the petitioner. Where the cause is a proper one for review by the appellate division, a triable issue as to the accuracy of completeness of the transcript, of the record of proceedings annexed to the answer, shall be tried, after transfer of the proceedings to the appellate division, in the manner provided in section twelve hundred and ninety-five of this article for the trial of an issue of fact arising in a proceeding instituted in the appellate division."

APPENDIX "B".

No. 6302

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE DEPARTMENT OF EDUCATION

Before the Commissioner

In the Matter of the Appeal
of
REGINALD LUSH from the action of the voters of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, at a special district meeting held on the 17th day of November, 1956, in authorizing the construction of a new school building.

Francis G. Hessney, Esq., Attorney for Petitioner.
Max G. Morris, Esq., Attorney for Respondent.
Bond and McDonald, Esqs., Attorneys for Intervenors.

At the outset it should be pointed out that while the petition is signed and verified by Reginald Lush, such petition states that the petitioner "on behalf of the Red Jacket Citizens School Committee" appeals to the Commissioner of Education seeking to set aside the action of a special school district meeting. It has heretofore been held that an unincorporated association is not an aggrieved party within the meaning of Section 310 of the Education Law (*Matter of Lawisboro-Vista Civic Association*, 73 State Dept. Reps. 178; *Matter of Lebanon Valley Taxpayers Association*, 74 *id.* 6). Consequently, the Red Jacket Citizens School Committee is not a person "aggrieved" within the

meaning of Section 310 of the Education Law, but since the petition is signed and verified by a qualified voter of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, this matter will be considered as an appeal to the Commissioner of Education by Reginald Lash as an individual.

An application to intervene in this proceeding has been filed by Vincent Fogarty, Virginia Lupold, Leon Van Norman and Dorothy Crowther, both individually and as officers of the Red Jacket Civic Association. For the same reasons, the application to intervene will be deemed to be individual applications to intervene of the four aforementioned persons, and such application is granted.

The record herein is voluminous and an examination thereof indicates that a great deal of the material therein has no bearing upon the questions raised in the petition. The petition seeks to set aside the action of the voters of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, at a special school district meeting held on the 17th day of November, 1956, which authorized the construction of a school building at a cost of not to exceed $1,350,000 and authorized the issuance of obligations of the district in such sum. It appears that at such meeting the vote was as follows:

Yes	597
No	550
Blank	45
Void	1

The petition further alleges that 48 persons were not permitted to cast their ballots at said meeting because such persons had not registered pursuant to the provisions

of Section 2014 of the Education Law, and further points out that 11 persons who were not registered were actually permitted to cast their ballots.

The first contention of the petitioner is that the proposition did not receive a majority vote. As noted above, there were 597 affirmative votes and 550 negative votes, making a total of 1147 votes cast. A majority of 1147 is 574 votes. Since the proposition received an affirmative vote of 597, it is obvious that the proposition received a majority of the votes cast at the meeting. It has heretofore been held that blank and void ballots are not considered in determining whether a proposition received a majority vote (*Matter of Smith v. Proctor*, 130 N. Y. 319; *Matter of Godin*, 68 State Dept. Reps. 22; *Matter of Gran*, 69 *id.* 39; *Matter of Knott*, 73 *id.* 93).

It appears from the record that 11 persons who were not registered were allowed to cast their ballots. Assuming for the purposes of this appeal that said 11 votes were illegally cast, if the 11 votes are deducted from the affirmative vote of 597 the result is an affirmative vote of 586, which when added to the negative vote of 550 makes a total vote cast of 1136, and a majority vote of this total would be 569. Thus, even on the assumption that said 11 persons should not have been allowed to cast their ballots this would not be a basis to set aside the action of the voters at the special school district meeting, since such 11 votes, even if cast for the proposition, could not have affected the result of the meeting. There is no basis for setting aside the action of a meeting because 48 persons were not permitted to vote because they had not registered. Where the board has adopted personal registration an individual who is not registered is not entitled to vote.

Appendix "B".

The other contentions raised in the petition go to matters not involved in the conduct of the special school district meeting sought to be set aside herein, and in any event would require the Commissioner to engage in sheer speculation in order to invalidate the meeting. It has been held that the Commissioner of Education will not invalidate the action of a special district meeting upon such basis (*Matter of O'Brien*, ___ A. D. 2d ___ Third Department, decided March Term 1957).

For all of the foregoing reasons THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, James E. Allen, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 27th day of March, 1957.

JAMES E. ALLEN, JR.,
Commissioner of Education.

(SEAL)

APPENDIX "C".

STATE OF NEW YORK

SUPREME COURT

THIRD JUDICIAL DEPARTMENT

COUNTY OF ALBANY

In the Matter of the Appeal

of

REGINALD LUSH, under Article 78 of the Civil Practice Act, to review the decision and order of the Commissioner of Education of the State of New York, Respondent, holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County, in the State of New York.

(Supreme Court, Albany County Special Term, June 24, 1957, adjourned from June 14, 1957.)

(Justice Herbert D. Hamm, Presiding.)

Appearances:

Francis G. Hessney, Esq.,
Attorney for Petitioner.

Charles A. Brind, Jr., Esq.,
(John P. Jehu, Esq.,
Elizabeth M. Eastman,
George B. Farrington, Esq.,
of counsel);
Attorney for Respondent.

Appendix "C".

MEMORANDUM

HAMM, J.:

This is a proceeding under article 78 of the Civil Practice Act. The Commissioner of Education dismissed the appeal by this petitioner to set aside the action of a special school district meeting which authorized the construction of a school building at a cost not to exceed $1,350,000.00 and authorized the issuance of obligations of the district in that sum.

The vote at the meeting was as follows:

Yes	597
No	550
Blank	45
Void	1

Subdivision 2 of section 416 of the Education Law provides for ascertaining the votes of "qualified voters attending and voting". When the expression "qualified voters attending and voting" is employed blank and void ballots will not be considered in determining whether a proposition was approved or defeated (Matter of Colson v. Allen, 285 App. Div. 797). On appeal the petitioner contended that the proposition did not receive a majority vote. The total of 597 affirmative votes and 550 negative votes is 1147. A majority of 1147 is 574 and the proposition received an affirmative vote of 597.

It appears that 11 persons who were not registered were allowed to cast their ballots. Assuming that 11 votes were illegally cast, deducting the 11 votes from the affirmative vote of 597 leaves an affirmative vote of 586. This vote, when added to the negative vote of 550, makes a total of

1136. A majority of this total would be 569. The votes of the 11 persons alleged to have been improperly permitted to cast their ballots could not have affected the result of the meeting.

It is alleged that one person was permitted to vote a second time and that another person was refused the right to vote after he complained he could not push the "No" lever down. Deducting an affirmative vote and adding a negative vote likewise would not change the result.

Affidavits are furnished from three other voters that they had difficulty in pushing the "No" lever down. No evidence was adduced that they did not in fact push the lever down and that their votes were not properly recorded. The Commissioner was correct in refusing to speculate on the basis of these affidavits, conceding them to be correct, that the machines functioned improperly so as to fail to record votes.

Two affidavits were submitted to the Commissioner that the knob above and below the "No" level were not locked. This seems obviously in error as customarily there is no knob above the "No" lever and the next lower knobs are on row A. But, in any event, no proof is offered that any vote failed of recording or was improperly recorded because of an unlocked knob.

The petitioner complains that 48 persons not personally registered were not permitted to vote. If a board of education of a district does not adopt personal registration pursuant to the provisions of subdivision 1 of section 1804 and of section 2014 of the Education Law, any qualified voter of the district may present himself to the meeting

and, after his name has been placed on the poll list, may cast his ballot. Under the alternate procedure for registration voters must have been registered previously. Reginald Lush, who is the petitioner herein, had, prior to this proceeding and the appeal on which it is based, appealed to the Commissioner of Education with relation to the election of members of the Board of Education. He questioned the establishment of personal registration. On March 9, 1956, the Commissioner upheld the validity of the resolution to establish a board of registration for the district but sustained the appeal on the ground that the arrangement of the candidates did not conform with the provisions of section 2032 of the Education Law and on the further ground that provision was not made on the voting machines for write in votes. On June 20, 1956, he reopened and dismissed the appeal on the ground that he had reached his decision under a misapprehension of fact as to arrangement of candidates and provision for write in votes. He again upheld the validity of personal registration. In the notice of the special meeting herein sought to be reviewed notice of requirement of personal registration was given to unregistered voters. The notice stated:

> "And notice is also given that personal registration of all qualified voters is required. The Board of Registration shall meet on November 3, 1956, at the Manchester School, in the said Village of Manchester, from ten o'clock, A. M., to three o'clock P. M., Eastern Standard Time, and at the Shortsville School, in the Village of Shortsville, in said District, on November 10, 1956, from three o'clock, P. M. to eight o'clock, P. M., Eastern Standard Time, for the purpose of preparing the register of the school district, and any person who did not register at the annual school meeting which was held on July 10, 1956, shall be entitled

to have his or her name placed upon such register, provided that he or she is known, or proven to the satisfaction of such Board of Registration, to be then or thereafter entitled to vote at such special meeting."

And prior thereto notice had been given that the board would meet for registration on July 10, 1956, and also on July 11, 1956. To have permitted the 48 unregistered persons to vote would not have been legal.

It is complained that recommendations of the State Education Department were not publicized to the voters. The recommendations of the Education Department are purely advisory both as to the Board and to the voters. Failure to publicize such recommendations did not invalidate the action taken at the special meeting.

Complaint is made obscurely about options procured by the Board prior to the special meeting. It was merely good business practice to secure options on parcels of land prior to the time the Board obtained the authority from the voters to acquire a site. Under the provisions of the Education Law (section 1709, subdivision 6), the board of education of a central school district cannot acquire a site until the same has been designated by a meeting of the district. Obtaining options did not affect and did not invalidate the action taken at the special meeting.

It is contended that the voters were misled by the display and advertising of brochures showing a high school with an auditorium. The brochures, which are part of the return, speak for themselves. Moreover, the Petitioner's Exhibit D mailed to the voters before the election clearly stated "If carried, you will have an opportunity to vote for an auditorium to this building". And, in addition to the

refutation of Exhibit D, which also speaks for itself, no proof was offered that any voter had been misled. It could not be found that there was no rational basis for the Commissioner's finding that the brochures did not invalidate the meeting and, on the record submitted to him, for his refusal to speculate.

The absence of public meeting is complained of. There is no requirement that the Board of Education call informational district meetings for discussion of proposed school building programs.

It is complained that sessions were held to which the public was not invited. Section 1708 of the Education Law providing that meetings of boards of education shall be open to the public also provides that "said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present." No proof was submitted that formal action binding upon the district and recorded in the minutes was taken other than openly.

It is contended that the voters were misled as to state aid. The Board of Education furnished a brochure. The computation of state aid as to the plan without an auditorium and as to the plan with an auditorium appeared as follows in the brochure:

"State Share	*"State Share*
$26,775	$24,640
26,397	24,304
26,019	23,968
25,641	23,632
25,263	24,416

Appendix "C".

"State Share	*"State Share*
26,285	24,326
25,865	23,948
25,445	23,850
25,025	24,584
24,605	24,164
25,585	23,744
25,123	23,324
24,661	22,904
24,199	23,884
23,737	23,422
23,975	24,360
23,492	23,856
23,009	23,352
22,526	22,848
22,043	22,344
22,960	21,840
22,435	21,336
21,910	20,832
21,385	20,328
20,860	19,824
21,735	19,320
21,168	18,816
20,601	18,312
20,034	17,808
19,467"	17,304"

Column 1 relates to a building without an auditorium and column 2 relates to a building with an auditorium. The brochure did not contain an addition of the amounts but addition discloses that the total sum of the first column, aid for a building without an auditorium is $708,225.00, whereas the total sum for the second column, aid for a building with an auditorium, is $67[illegible]590.00. State aid for buildings is computed in accordance with section 1806 of

the Education Law. The Commissioner of Education must compute the "ceiling" as outlined in paragraph a of subdivision 1 of the section. Even assuming that the ceiling did not include the expense of an auditorium and that the additional cost of an auditorium would be exclusively a district charge, there is still an error of $36,635.00. This was for all practical purposes a latent error because the brochures did not include the additions. No proof was submitted that anyone was misled by the board's mistake or by, as apparently was the case, the Education Department's mistake. It is to be noted from the face of the brochures also that the board pointed out that the state aid calculated in Albany was not final but was "probably different by this time." No question of fact is involved and it cannot be said that there could be no rational basis for the commissioner's determination that an error was insufficient to invalidate the action of the meeting and that he was not required to engage in speculation.

The Board of Education paid architects $5,000.00. The Board may spend money for preliminary plans and such payment is merely payment for specific work performed. However, assuming that the payments was an illegal advancement on a contract, it did not affect the action of the special meeting. The petitioner's remedy is to compel restoration.

The petitioner complains that he was deprived of due process because the Commissioner failed to conduct a hearing at which oral evidence was received. This contention is without merit (Matter of Kuhn v. Comr. of Educ., 1 A. D. 2d 533, appeal dismissed 2 N. Y. 2d 749; Matter of O'Brien v. Comr. of Educ., 3 A. D. 2d 321).

Appendix "C".

The petition contains one hundred twenty-one allegations. There may be some "fringe issues of fact" involved (*Cf.* Matter of Badman v. Falk, 4 A. D. 2d 149, 153) but none of them is such that its resolution in the petitioner's favor would leave no rational basis for the Commissioner's decision. And as to all of the issues sought to be raised by the petitioner, Mr. Justice Halpern's statement is apposite (Matter of O'Brien v. Comr. of Educ., 3 A. D. 2d 321, *supra*, 325):

> "* * * In an appropriate case, in a proceeding in the nature of mandamus, the court may direct a hearing to be held (Civ. Prac. Act, § 1295; Matter of Acuri v. Macduff, 286 App. Div. 17, and the cases there cited). However, in order to be entitled to a hearing, the petitioner must demonstrate that there is a triable issue of fact, the resolution of which in his favor would leave no rational basis for the administrative decision. This the petitioners failed to do in this case."

The petition is dismissed without costs. Submit order on three days' notice.

Dated at Troy, New York, October 8, 1957.

APPENDIX "D".

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down April 23, 1959

1051

In the Matter of the Appeal
of
REGINALD LUSH,

Petitioner-Appellant.

Under Article 78 of the Civil Practice Act to review the decision and order of the Commissioner of Education of the State of New York,

Respondent.

Holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County in the State of New York.

Appeal from an order of a Special Term, Supreme Court, Albany County (Hamm, J.).

Order dismissing petition to review a determination of the State Commissioner of Education affirmed on the opinion of Mr. Justice Hamm at Special Term with $50 costs. The determination by the Commissioner was in the exercise of his appellate jurisdiction on an appeal to review an election at which a central school district considered a

proposition authorizing a school construction in which the Commissioner dismissed the appeal.

Order unanimously affirmed, without costs.

Present—Foster, P. J., Bergan, Coon, Gibson and Herlihy, JJ.

(Copy)

(No Opinion written unless indicated hereon.)

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down April 29, 1959

1051

In the Matter of the Appeal

of

REGINALD LUSH,

Petitioner-Appellant,

Under Article 78 of the Civil Practice Act to review the decision and order of the Commissioner of Education of the State of New York.

Respondent.

Holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County, in the State of New York.

Decision of this Court, handed down April 23, 1959, amended to read as follows:

Appendix "D".

Appeal from an order of a Special Term, Supreme Court, Albany County (Hamm, J.).

Order dismissing petition to review a determination of the State Commissioner of Education unanimously affirmed on the opinion of Mr. Justice Hamm at Special Term with $50 costs. The determination by the Commissioner was in the exercise of his appellate jurisdiction on an appeal to review an election at which a central school district considered a proposition authorizing a school construction in which the Commissioner dismissed the appeal.

Present—Foster, P. J., Bergan, Coon, Gibson and Herlihy, JJ.

(Copy)

(No opinion written unless indicated hereon.)

APPENDIX "E".

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-second day of October A. D. 1959.

Present: Hon. Albert Conway,

Chief Judge, presiding.

Mo. No. 367.

In the Matter of the Appeal
of
REGINALD LUSH,

Appellant,

Under Article 78 of the Civil Practice Act, to review the decision and order of the Commissioner of Education of the State of New York,

Respondent,

Holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County, in the State of New York,

Intervenor-Respondent.

Motions having heretofore been made upon the part of the respondent and the intervenor-respondent to dismiss the appeal taken by the appellant in the above cause to this Court and after having heard Max G. Morris, Esq., and

Appendix "E".

Charles A. Brind, Jr., Esq., in support of said motions and Francis G. Hessney, Esq., in opposition thereto and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are granted and the appeal dismissed upon the ground that no substantial constitutional question is directly involved.

A copy

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

Sir:

Please take notice that the foregoing is a true copy of an order duly made in the above entitled matter and duly entered and filed in the office of the Clerk of the County of Albany, on the 5th day of November, 1959.

Dated: Albany, N. Y., November 5, 1959.

CHARLES A. BRIND, JR.,
Attorney for
Office & P. O. Address,
State Education Building,
Albany, N. Y.

To:

Francis G. Hessney, Esq.,
74 So. Main Street,
Canandaigua, New York.

Max G. Morris, Esq.,
Manchester, New York.

APPENDIX "F".

Order of Appellate Division.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, convened on the 4th day of January, 1960.

Present: Hon. Francis Bergan,

Presiding Justice.

" William H. Coon,
" James Gibson,
" J. Clarence Herlihy,
" Walter B. Reynolds,

Associate Justices.

In the Matter of the Appeal
of
REGINALD LUSH,

Petitioner-Appellant,

Under Article 78 of the Civil Practice Act to review the decision and order of the Commissioner of Education of the State of New York,

Respondent-Respondent,

Holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County, in the State of New York.

The above-named Petitioner-Appellant having moved for an order permitting him to re-argue this appeal before this

Court, or in the alternative, for permission to appeal to the Court of Appeals from the Order of this Court entered in the office of the Clerk of the County of Albany, on the 5th day of May, 1959, which unanimously affirmed on the opinion of Mr. Justice Hamm the Order of a Special Term of the Supreme Court of the State of New York, Albany County, in the above entitled proceedings, dated the 31st day of October, 1957, and entered in the office of the Clerk of the County of Albany on the 7th day of November, 1957, dismissing on the merits the petition of the above-named Petitioner-Appellant under Article 78 of the Civil Practice Act to review a determination of the above-named Respondent-Respondent Commissioner of Education of the State of New York holding valid a special election held by the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, which said Order of this Court was the subject of an appeal to the Court of Appeals of the State of New York, and the said Court of Appeals having ordered that motions by the above-named Respondent-Respondent and by the above-named Central School District No. 1, as Intervenor-Respondent, to dismiss the appeal be granted and the appeal dismissed upon the ground that no substantial constitutional question is directly involved, which said Order of the Court of Appeals, dated the 22nd day of October, 1959, was entered in the office of the Clerk of the County of Albany on the 5th day of November, 1959 and upon reading and filing the notice of said motion, together with the affidavit of Francis G. Hessney, Esq., sworn to on the 3rd day of December, 1959, in support of said motion; the affidavit of Charles A. Brind, Jr., Esq., attorney for the above-named Respondent-Respondent, sworn

to on the 11th day of December, 1959, in opposition thereto; the affidavit of Max G. Morris, Esq., attorney for the above named Central School District No. 1, sworn to on the 12th day of December, 1959, also in opposition to said motion, and upon all the papers and proceedings herein; and the motion having duly and regularly come on to be heard, and due deliberation having been had thereon, and it appearing to the satisfaction of the Court that there has been presented no ground on which to base an order permitting Petitioner-Appellant to re-argue the appeal before this Court and that there is no question of law involved which need be reviewed by the Court of Appeals or certified to that Court,

Now, on motion of Charles A. Brind, Jr., Esq., attorney for Respondent-Respondent Commissioner of Education of the State of New York and Max G. Morris, Esq., attorney for Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, Intervenor-Respondent, it is

ORDERED, that the motion for re-argument, or in the alternative, for permission to appeal to the Courts of Appeals be and the same hereby is denied, without costs.

s/ J. ROBERT LANNON,
Clerk.

Ent. 2-3-60.

A true copy.
s/ J. Robert Lannon,
Clerk.

Appendix "F".

NOTICE OF ENTRY.

Sir:

Please take notice that the foregoing is a true copy of an Order duly made in the above-entitled matter and duly entered and filed in the office of the Clerk of the County of Albany, on the 3rd day of February, 1960.

Dated: Albany, N. Y., Februa.y 3, 1960.

CHARLES A. BRIND, JR.,
Attorney for the Respondent-Respondent, Commissioner of Education,
Office & P. O. Address,
State Education Building,
Albany, New York.

To:

Francis G. Hessney, Esq.,
Attorney for the Petitioner-Appellant,
74 South Main Street,
Canandaigua, New York.

APPENDIX "G".

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the first day of April A. D., 1960.

Present: Hon. Charles S. Desmond,
Chief Judge, presiding.

Mo. No. 193.

In the Matter of the Appeal
of
REGINALD LUSH,
Appellant,

Under Article 78 of the C. P. A. to review the decision and order of the Commissioner of Education of the State of New York,
Respondent,

Holding valid a special election &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

s/ GEARON KIMBALL,
Deputy Clerk.

(SEAL)

Appendix "G".

Sir:

Please take notice that the foregoing is a true copy of an order duly made in the above entitled matter and duly entered and filed in the office of the Clerk of the County of Albany, on the 21st day of April, 1960.

Dated: Albany, New York, April 21, 1960.

CHARLES A. BRIND,
Attorney for Respondent,
Office & P. O. Address,
State Education Building,
Albany, New York.

To:

Francis G. Hessney, Esq.,
74 South Main Street,
Canandaigua, New York.

Max G. Morris, Esq.,
South Main Street,
Manchester, New York.

FILE COPY

Supreme Court, U.S.
FILED
FEB 27 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 683

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

MOTION TO DISMISS APPEAL

CHARLES A. BRIND,
Attorney for Respondent,
Commissioner of Education,
State Education Building,
Albany, New York.

BRIGGS PRESS, LAW PRINTERS
ALBANY, N. Y.

INDEX.

	PAGE
Pertinent Statutes	2
Statement of Facts	4
Argument	9
I. The appeal from the order of the New York Court of Appeals of October 22, 1959 is not timely	9
II. The appeal herein does not present a substantial Federal question	12
Conclusion	15

CITATIONS.

Cases

Department of Banking v. Pink, 317 U. S. 264	10
Kabatt v. Board of Education, 300 U. S. 657, 300 U. S. 687	14
Murphy v. Commissioner of Education, 361 U. S. 117	13, 14

Statutes

Article XIV, Section 1 of the Amendments to the Constitution of the United States	12
New York Civil Practice Act, Article 78	5, 6, 8
New York Civil Practice Act, Section 588	11
New York Civil Practice Act, Section 589	11
New York State Education Law, Section 310	2, 13
New York State Education Law, Section 311	3, 13
New York State Education Law, Section 2037	3, 13, 14
28 U. S. C. 1257 (2)	12
28 U. S. C. 2101 (c)	9

IN THE

Supreme Court of the United States

No. 683

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

MOTION TO DISMISS APPEAL

The Respondent, Commissioner of Education of the State of New York does hereby move to dismiss the appeal herein.

The ground for the Respondent's motion to dismiss the appeal from the order of the New York Court of Appeals, decided October 22, 1959 and which order dismissed the appeal taken to such Court as of right, is as follows:

I. The appeal is not timely.

II. The appeal does not present a substantial Federal question.

The ground for Respondent's motion to dismiss the appeal from the order of the New York Court of Appeals,

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§ 311. **Powers of commissioner upon appeals or petitions, et cetera.** The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribed conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

§ 2037. **Determination of meeting or election disputes.** All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election.

Statement of Facts

The source of the controversy in question was the adoption of a proposition, authorizing the construction of a school building at a cost not to exceed $1,350,000 and the issuance of obligations of the district in such sum, by the voters of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, at a special district meeting held on November 17, 1956. The proposition was carried by a vote of 597 in favor to 550 against. The total vote was 1147.

Reginald Lush, the Appellant herein, a qualified voter of the school district, appealed to the Respondent Commissioner of Education on behalf of the Red Jacket Citizens School Committee to set aside the election on numerous grounds.

The Petitioner alleged *inter alia* that 48 persons were not allowed to vote because they had not registered and 11 persons who had not registered were allowed to vote. The Commissioner of Education held that since registration was a prerequisite to voting, the 48 persons in question were properly refused the opportunity to vote. Moreover, it was also held that if the 11 voters who were allowed to vote, although unregistered, were counted as having voted for the proposition the result was not changed.

The Commissioner of Education also held, in accordance with previous decisions, that, for the purpose of determining a majority, void and blank votes are not counted.

The Commissioner of Education further decided that the remaining matters covered by the petition either involved matters not involved in the conduct of the school meeting or else would require the Commissioner to engage in sheer speculation.

The appeal was dismissed on March 27, 1957.

Thereafter, Reginald Lush commenced a proceeding under Article 78 of the New York Civil Practice Act seeking to review and annul Respondent Commissioner's decision.

Justice Herbert D. Hamm, presiding at a Special Term of the New York Supreme Court held in the County of Albany, on October 8, 1957 dismissed the petition on the merits. He stated that "the petition contains one hundred twenty-one allegations. There may be some 'fringe issues of fact' involved * * * but none of them is such that its resolution in the petitioner's favor would leave no rational basis for the Commissioner's decision."

Appellant then appealed to the Appellate Division of the Supreme Court, Third Judicial Department, from Justice Hamm's order dismissing the petition in the Article 78 proceeding.

On June 20, 1958 the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, moved for permission to intervene in the proceeding before the Appellate Division of the Supreme Court, Third Judicial Department, and such permission was granted by such Court August 4, 1958.

On December 5, 1958 the Respondent Board of Education voted to close portions of the Shortsville Elementary School. This action was taken on the recommendation of the District Superintendent of Schools because of letters from the local District Health Officer and the Fire Safety Co-ordinator of the New York State Education Department. As a result of the large number of pupils for whom provision had to be made because of the closing of a portion of this schoolhouse, double sessions became necessary.

Thereafter Roberta J. Abbott, a resident of the school district in question, with the attorney for Appellant herein representing her, commenced a proceeding under Article 78 of the New York Civil Practice Act to compel the Respondent Board of Education and the District Superintendent of Schools to reinstitute full-day school sessions.

On May 12, 1959 New York Supreme Court Justice Charles Lambiase dismissed the petition in the Abbott proceeding. In his decision Justice Lambiase said "It would seem that the two letters to which reference has heretofore been made constitute a sufficient basis for the exercise of discretion resulting in the curtailment of classroom hours, and that in the exercise of discretion there was sufficient evidence upon which the Board reached its conclusion that some of the classrooms in the building (taken out of use) were not safe." No appeal has been taken in the Abbott proceeding.

The Appellate Division of the Supreme Court, Third Judicial Department, in a decision dated April 23, 1959, unanimously affirmed the order of the lower Court dismissing the petition in the instant proceeding. On April 29, 1959 the Appellate Division of the Supreme Court, Third Judicial Department, amended its decision to allow costs. An order to this effect was entered on May 5, 1959 and Appellant thereupon appealed as of right to the New York Court of Appeals from such order.

The New York Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" on October 22, 1959, and an order to this effect was entered on November 5, 1959.

On December 3, 1959 Appellant moved in the Appellate Division of the Supreme Court, Third Judicial Department,

for reargument or for leave to appeal to the New York Court of Appeals. These motions were denied on January 12, 1960, and the order was entered on February 3, 1960.

On February 27, 1960 Appellant moved in the New York Court of Appeals for leave to appeal to the New York Court of Appeals. This motion was denied by the New York Court of Appeals on April 1, 1960, and the order was entered in the office of the Clerk of Albany County on April 21, 1960.

On or about June 27, 1960 the Appellant served on the Respondent Commissioner of Education and filed with the Clerk of the Court possessed of the record a Notice of Appeal to the United States Supreme Court from the aforesaid order of the New York Court of Appeals dated October 22, 1959, entered in the office of the Clerk of the County of Albany on November 5, 1959, and from the aforesaid order of the New York Court of Appeals, entered in the office of the Clerk of the County of Albany on April 21, 1960.

A cross-designation of additional portions of the record was served and filed by the Respondent Commissioner on or about July 15, 1960.

A further cross-designation of additional portions of the record was served and filed by Intervenor-Respondent on or about July 13, 1960.

On August 15, 1960 Honorable Charles S. Desmond, Chief Judge of the New York Court of Appeals granted Appellant's first motion to extend the time for filing the record in the United States Supreme Court to October 1, 1960.

On or about September 19, 1960 Appellant petitioned Respondent Commissioner of Education to reopen the appeal dismissed on March 27, 1957.

Around September 19, 1960 several persons presented a petition to the Board of Education to call a new meeting to vote in regard to erection of the school building in question. The Board of Education refused to act.

On October 7, 1960 Appellant requested the District Superintendent of Schools to order a new meeting. The District Superintendent declined upon the ground that he had no jurisdiction.

On November 17, 1960 Honorable Marvin R. Dye, Associate Judge of the New York Court of Appeals, granted Appellant's second motion to extend the time for filing the record in the United States Supreme Court to February 1, 1960.

On or about December 31, 1960 Reginald Lush and John Abbott commenced an Article 78 proceeding seeking to compel the Respondent Board of Education and the District Superintendent of Schools to call a special district meeting to reconsider the "disputed" proposition. The attorney of record for the Appellants in that proceeding is Francis G. Hessney, Esq. That proceeding remains *sub judice.*

On September 19, 1960 the Appellant herein filed an application with the Commissioner of Education seeking to have the Commissioner of Education reopen the appeal which resulted in the original determination of the Commissioner on March 27, 1957, which decision is the subject of this proceeding. On January 6, 1961 the Commissioner of Education dismissed this application to reopen on the grounds that the Appellant in such application had presented no new evidence and that the original decision had not been rendered under any misapprehension as to the law or the facts. The attorney for the Appellant herein

has stated that this dismissal of the application to reopen will be subjected to a court review in New York State, but as of this date such a proceeding has not been commenced.

ARGUMENT

I.

The appeal from the order of the New York Court of Appeals of October 22, 1959 is not timely.

The appeal from such order of the New York Court of Appeals on October 22, 1959 was not commenced within the time prescribed by statute. The Appellant has 90 days from the date of the final order and judgment of the highest court of the State of New York in which to commence an appeal to the United States Supreme Court under 28 U. S. C. 2101 (c). One of the orders sought to be appealed from herein was made by the New York Court of Appeals on October 22, 1959. Thus, the time for Appellant to appeal to this Court commenced on October 22, 1959 and had long since expired when the notice of appeal herein was served on or about June 27, 1960. In fact, it was approximately 235 days after the day of the order sought to be appealed from.

The Appellant herein after the order of the New York Court of Appeals denying the appeal as of right for lack of substantial constitutional question made a motion in the Appellate Division of the Supreme Court, Third Judicial Department, for reargument or for leave to appeal to the New York Court of Appeals. These motions were denied by the Appellate Division of the Supreme Court, Third Judicial Department, on January 12, 1960. Thereafter the Appellant made a motion in the New York Court of Ap-

peals for leave to appeal to the New York Court of Appeals, which motion was denied by the New York Court of Appeals by an order on April 1, 1960. The Appellant contends that these motions for reargument and leave to appeal tolled the 90-day period.

The time to appeal to the United States Supreme Court commences to run in the case of an appeal from the final order of the New York Court of Appeals on the date of the final order and judgment of the New York Court of Appeals which is sought to be appealed from. (*Department of Banking v. Pink*, 317 U. S. 264.)

The Appellant has never made a motion for reargument in the New York Court of Appeals from the order of the Court of Appeals dismissing his appeal to the New York Court of Appeals as of right, which order determined the lack of a substantial constitutional question, so there is no question as to the statutory period for bringing an appeal being tolled by a motion for reargument.

Motions for leave to appeal cannot be treated as applications for reargument since, in the first place, they are not such.

The Appellant herein obtained a final order of the New York Court of Appeals on October 22, 1959, which order determined that the New York Court of Appeals dismissed his appeal to such Court as of right upon the grounds that no substantial constitutional question was directly involved. There must be an end to litigation, and there must be definite time limits upon which litigants may depend. If a person wishes to appeal the final order of the New York Court of Appeals to this Court, such person should pursue his remedy expeditiously and file a notice of appeal within 90 days of the final order. The motions by the Appellant

for leave to appeal to the Court of Appeals were based upon Section 589 of the New York Civil Practice Act. The prior appeal as of right to the New York Court of Appeals by the Appellant had been based upon Section 588 of the New York Civil Practice Act, which provides for an appeal as of right in a proceeding directly involving the construction of the United States Constitution. The Appellant, as heretofore stated, took his appeal as of right based upon this said Section 588 of the New York Civil Practice Act and had the New York Court of Appeals determine by a final order that there was no substantial constitutional question directly involved. The Appellant thereafter did not file his notice of appeal to this Court within the 90-day period prescribed by statute, but instead abandoned his claim of a constitutional question and thus his right to appeal to the New York Court of Appeals as of right and then sought relief pursuant to Section 589 of the New York Civil Practice Act in motions addressed to both the Appellate Division of the Supreme Court, Third Judicial Department, and the New York Court of Appeals, requesting said Courts in their discretion to determine that an appeal should be granted to the New York Court of Appeals. The Appellant was unsuccessful in both of these motions. The Appellant herein thus could have brought his appeal to this Court within the 90 days after the final order of the New York Court of Appeals dismissing his appeal to such Court of Appeals as of right, but he failed to do so and since the notice of appeal is untimely motions for leave to appeal cannot revive the expired time to appeal.

II.

The appeal herein does not present a substantial Federal question.

At the outset, it is respectfully submitted that the purported appeal from the order of the New York Court of Appeals denying leave to appeal is not an appeal from a final order of the New York Court of Appeals within the meaning of U. S. 1257 (2) but is rather an order of the New York Court of Appeals denying a motion addressed to the discretion of such Court.

It is respectfully submitted that even if this appeal had been brought in a timely manner, the finding of any substantial Federal question is foreclosed by a multitude of prior decisions of Federal Courts, and particularly of this Court, which have already determined all issues purported to be raised herein by appellants.

Although Appellant purports to appeal to the United States Supreme Court under the provisions of subdivision (2) of Section 1257 of the United States Code, the Jurisdictional Statement and the Notice of Appeal are devoid of any allegation that any particular statute or statutes of the State of New York are "repugnant to the Constitution, treaties or laws of the United States."

There is a notable lack of evidence in the record that Appellant Reginald Lush was deprived of any "life, liberty, or property, without due process of law" or was denied "equal protection of the laws." (Article XIV, Section 1, of the Amendments to the Constitution of the United States.)

The appeal to the Commissioner of Education of the State of New York was taken pursuant to the provisions

of Section 310 of the New York State Education Law, and the decision of the Commissioner was rendered pursuant to that section and Section 2037 in the same manner as was upheld in *Murphy* v. *Commissioner of Education* (361 U. S. 117).

In the appeal to the Commissioner, the petitioners were afforded complete procedural due process of law and full protection of the laws of the State of New York. An examination of the record herein will demonstrate that the entire proceeding before the Commissioner of Education was conducted in compliance with rules adopted by the Commissioner pursuant to the express provisions of statute. All parties were given complete opportunity to file pleadings, to present whatever exhibits, documents, materials and affidavits they so desired, to argue the matter fully before the Commissioner and to file and exchange briefs. Only after all such material and briefs were submitted by the parties did the Commissioner of Education make his decision, based on the entire record before him. This is the same procedure which has been followed in literally thousands of appeals brought before the Commissioner of Education for decision in the past.

The Commissioners of Education of the State of New York over the years have decided fairly and impartially thousands of appeals relating to school matters which were brought pursuant to the provisions of Section 310 of the Education Law of the State of New York and the Rules of Practice drawn up by the Commissioner pursuant to Section 311 of the Education Law of the State of New York. There is nothing in this procedure which is repugnant to the Constitution of the United States. On the contrary, the Constitutional safeguards on behalf of the individual are specifically preserved in the aforesaid

statutes and rules. This same procedure was upheld in *Murphy v. Commissioner of Education*, 361 U. S. 117. (See also Kabatt v. Board of Education, certiorari denied 300 U. S. 657, rehearing denied 300 U. S. 687.)

Insofar as Section 2037 of the New York State Education Law is concerned, there appears to be no basis for questioning the constitutionality of the Legislature's action in prescribing that the Commissioner of Education, as head of the State's public educational system, shall settle in finality all disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election. The Commissioner is probably the best-qualified person in the State to decide such disputes, which undoubtedly is the reason the Legislature has placed this responsibility on him.

The Appellant Reginald Lush apparently was displeased with the outcome of the vote on the above-mentioned school construction project, but he has had his fair and just chance to present his viewpoints and to have his claims of irregularity decided legally by competent authority. His further displeasure with the result of his appeal does not make the procedure on appeal to the Commissioner of Education unconstitutional.

There appears to be no basis for Appellant's claim that the Commissioner's decision and order were unconstitutional.

Appellant has been treated fairly, equitable and impartially in this entire matter. He has not been deprived of or denied any of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

Respectfully submitted.

CHARLES A. BRIND,
Attorney for Respondent,
State Education Building,
Albany, New York.

JOHN P. JEHU,
ELIZABETH M. EASTMAN,
GEORGE B. FARRINGTON,
of Counsel.

decided April 1, 1960, denying a motion for leave to appeal to the New York Court of Appeals is as follows:

I. The appeal does not present a substantial Federal question.

The following sections of the Education Law of the State of New York are pertinent to this action:

§ 310. **Appeals or petitions to commissioner of education and other proceedings.** Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

FILE COPY

FILED
MAR 9 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 683

IN THE MATTER
OF
REGINALD LUSH,
Appellant,
vs.
THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent,

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF MANCHESTER, FARMINGTON, HOPEWELL, ONTARIO COUNTY, STATE OF NEW YORK,
Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

NOTICE TO DISMISS APPEAL.

MAX G. MORRIS,
Attorney for Intervenor-Respondent,
South Main Street,
Manchester, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1961

Index.

	Page
Preliminary Statement	1
Statement of Facts	1
Argument	
POINT I. The Supreme Court lacks jurisdiction to entertain this appeal	4
POINT II. The appeal herein does not present a substantial federal question	9
Rebuttal	13
Conclusion	13
Appendix "A"	15

CITATIONS

CASES:

Arcuri, Matter of v. Macduff, 286 App. Div. 17 (3d Dept. 1955)	12
Badman, Matter of v. Falk, 4 A. D. 2d 149 (3d Dept. 1957)	11
Board of Educ. of the City of New York, Matter of v. Allen, 6 N. Y. 2d 127 (1959)	9
Department of Banking v. Pink, 317 U. S. 264 (1942)	7
Federal Trade Comm'n v. Minneapolis-Honeywell Co., 344 U. S. 206 (1952)	7, 8
Levitch, Matter of v. Board of Educ., 243 N. Y. 373 (1926)	10
Market St. Ry. v. Railroad Comm'n, 342 U. S. 548 (1945)	8
Murphy v. Commissioner of Educ., 361 U. S. 117 (1959)	9, 13, 14

Page

O'Brien, Matter of v. Commissioner of Educ., 4 N. Y. 2d 140 (1958) 9

Ross, Matter of v. Wilson, 308 N. Y. 605 (1955) 10

Zucht v. King, 260 U. S. 174 (1922) 4

STATUTES:

U. S. Const., amend. XIV 5, 9

28 U. S. C. §1257 ..... 3, 4, 8

28 U. S. C. §2101(c) 6

N. Y. Civ. Pract. Act §588(4) 5

N. Y. Civ. Pract. Act §589 6

N. Y. Civ. Pract. Act §1295 12

N. Y. Educ. Law §2215 (12) 11

MISCELLANEOUS:

Bunn, Jurisdiction and Practice of the Courts of the United States (5th ed. 1949) 4

NOTICE TO DISMISS APPEAL.

Preliminary Statement.

The intervenor-respondent, the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington, Hopewell, Ontario County, New York, does hereby move to dismiss the appeal herein.

The grounds for the motion to dismiss the appeal are as follows:

1. The Supreme Court lacks jurisdiction to entertain this appeal.

2. The appeal does not present a substantial Federal question.

Statement of Facts.

This litigation follows a Special Meeting of the voters of Central School District No. 1 of the Towns of Manchester, Farmington, Hopewell, Ontario County, New York, held November 17, 1956, at which a vote was taken on a proposition to build a junior-senior high school at an estimated cost of $1,350,000.

Prior to the meeting, the Board of Education had adopted personal registration as a prerequisite for voting at School District meetings.

After the voting, the chairman of the meeting declared the proposition adopted.

Appellant, Reginald Lush, appealed to respondent, Commissioner of Education, to set aside the declared result of the vote and declare the proposition lost on the grounds stated in his petition, the principal grounds being that forty-eight persons were not permitted to vote because they had not registered, and that eleven persons who had not registered were permitted to vote. The

result of the voting was "Yes," 597; "No," 550; blank, 45; void, one.

The Board of Education appeared and filed its answer by its attorney.

The Commissioner of Education, respondent herein, considered the voluminous record made up of material, affidavits, and exhibits submitted both by appellant and the Board of Education. The Commissioner of Education heard oral arguments from the attorneys representing the parties on January 30, 1957, and rendered a written determination dismissing the appeal on March 27, 1957 (appellant's jurisdictional statement, appendix "B").

Appellant then instituted a special proceeding in the New York Supreme Court, Albany County, by a petition to review the determination of the Commissioner of Education pursuant to Article 78 New York Civil Practice Act. Justice Herbert D. Hamm at a special term of the New York Supreme Court, Albany County, reviewed the proceedings and rendered a decision on October 8, 1957, dismissing the petition (appellant's jurisdictional statement, appendix "C").

Appellant next appealed to the Appellate Division of the New York Supreme Court, Third Judicial Department, from Justice Hamm's order dismissing the petition. The Appellate Division in a decision dated April 23, 1959, unanimously affirmed Judge Hamm's order (appellant's jurisdictional statement, appendix "D").

Appellant next appealed to the New York Court of Appeals from the unanimous affirmance of the Appellate Division, relying solely on alleged questions of constitutionality (see appellant's notice of appeal annexed hereto as appendix "A"). The appeal on this limited ground was taken as a matter of right.

The Court of Appeals on October 22, 1959, dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (see appellant's jurisdictional statement, appendix "E" at 44). After entry of this order of the Court of Appeals in Albany County Clerk's office on November 5, 1959, appellant moved in the Appellate Division, Third Department, for a re-argument of the appeal or in the alternative for leave to appeal to the Court of Appeals. This motion was unanimously denied January 4, 1960, and an order to this effect was entered February 3, 1960, in Albany County Clerk's office (appellant's jurisdictional statement, appendix "F").

Appellant then made a motion in the New York Court of Appeals for leave to appeal to that court, which was denied April 1, 1960, and entered in Albany County Clerk's office on April 21, 1960.

On June 27, 1960, appellant filed a petition for appeal to the Supreme Court of the United States from the first order of the New York Court of Appeals entered November 5, 1959 (in which the Court held that no substantial constitutional question was directly involved), as well as from the second order of the New York Court of Appeals entered April 21, 1960 (denying leave to appeal). The appeal is taken to this court pursuant to the provisions of title 28 U. S. C., section 1257(2) (1952).

It would appear from appellant's jurisdictional statement (pp. 2 and 3) that he is now limiting his appeal to the first order of the New York Court of Appeals (of November 5, 1959), and is abandoning his appeal from the second order (of April 21, 1960).

POINT I.

The Supreme Court lacks jurisdiction to entertain this appeal.

A. The Supreme Court may review only those final decisions of state courts which contain a substantial federal question.

Congress has, within constitutional limitations, provided Supreme Court review of final state court decisions in limited cases directly involving what are customarily called "federal questions." 28 U. S. C. §1257 (1952); see *Bunn, Jurisdiction and Practice of the Courts of the United States*, 241 (5th ed. 1949). Review will not be had, however, unless the federal question is substantial in character. *Zucht v. King*, 260 U. S. 174, 176 (1922) (dictum).

Appellant petitions for appeal here, under 28 U. S. C. §1257(2) (1952), on the ground that the New York Court of Appeals sustained the validity of various sections of the New York Education Law over appellant's contention that the operation and effect of the law were repugnant to the fourteenth amendment of the United States Constitution. There are two separate orders of the Court of Appeals involved here. One was filed on November 5, 1959 (see appellant's jurisdictional statement, appendix "E"), and the second was filed on April 21, 1960 (see appellant's jurisdictional statement, appendix "G").

B. All of the federal questions for which appellant seeks review were finally determined by the New York Court of Appeals order of November 5, 1959.

From the adverse decision of the trial court (see appellant's jurisdictional statement, appendix "C") and the

unanimous affirmance of the Appellate Division, Third Department (see appellant's jurisdictional statement, appendix "D"), appellant took his appeal as of right to the New York State Court of Appeals under §588(4) of the New York Civil Practice Act. This section permits appeals as of right from an order of a court of record of original jurisdiction

> which finally determines a special proceeding, where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

This section concludes:

> and on any such appeal, only the constitutional question shall be considered and determined by the court.

Following the requirements of this section, appellant states in his notice of appeal to the Court of Appeals that he was

> relying *solely* upon the question directly involving the construction of the following provisions of the Constitution of the State of New York * * * and the U. S. Constitution, Amendment 14, Section 1 * * * (appendix "A" hereto). (Italics added.)

Upon motion of the counsel for the Commissioner of Education, respondent here, the Court of Appeals, in its order entered November 5, 1959, dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (see appellant's jurisdictional statement, appendix "E" at 44). This order finally determined each and every constitutional, or "federal," question which appellant could have raised, and, in fact, did raise. Appellant is now attempting to appeal to this Court the constitutional questions determined adversely by the order of the Court of Appeals of November 5, 1959.

C. As the petition to appeal to this Court was not filed until June 27, 1960, this appeal from the order of the New York Court of Appeals of November 5, 1959 has not been timely filed.

Appellant had a period of ninety days in which to take his appeal to this Court. 28 U. S. C. §2101(c) (1952). Appellant took almost eight months to take its appeal from November 5, 1959, to June 27, 1960. No application to a Justice of the Supreme Court for an extension of time to appeal was made. Appellant is, therefore, barred from appealing to this Court from the order of the New York State Court of Appeals of November 5, 1959.

Appellant attempts, somewhat elliptically, to excuse his delay by explaining that events subsequent to the final order of November 5, 1959, tolled the ninety-day period (appellant's jurisdictional statement at 3). This contention is incorrect, because the subsequent events bear no relationship to the constitutional questions sought to be reviewed in this Court.

After the order of November 5, 1959, in which the Court of Appeals found no substantial constitutional question, appellant returned to the Appellate Division, Third Department, and pursued a different avenue of appeal on different grounds. Using the procedure of §589 of the New York Civil Practice Act, appellant moved in the Third Department for leave to appeal to the Court of Appeals. Leave was sought on questions of law other than the constitutional questions, which appellant did not and could not resurrect. After the Third Department denied appellant's leave (see appellant's jurisdictional statement, appendix "F"), he moved for leave directly in the Court of Appeals. This motion was denied by the second Court of Appeals order, entered April 21, 1960 (see appellant's jurisdictional statement, appendix "G").

The question is: did this second order keep alive the constitutional questions resolved by the first order? The answer found in *Department of Banking v. Pink*, 317 U. S. 264 (1942), and in *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952), is that it did not.

In the *Pink* case the Court held that an amendment to a final order of the New York Court of Appeals, which noted that a federal question was presented in the final order, did not extend the ninety-day period within which to apply for certiorari. The Court looked to see

> whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court.

Department of Banking v. Pink, 317 U. S. 264, 268 (1942). The Court found that the rights in the final order were fully and finally adjudicated and declined jurisdiction. Here the November 5, 1959 order of the Court of Appeals has also fully and finally adjudicated the constitutional issues involved.

The Court noted in the *Pink* case, *id.* at 266, that a timely petition for rehearing to the Court of Appeals tolls the limitation period because it operates to suspend the finality of the Court's judgment. There, as here, however, there was no such petition made to the Court of Appeals.

A plainer test than that in the *Pink* case is found in *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U. S. 206, 212 (1952).

> The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

In its order of April 21, 1960, the Court of Appeals was neither asked nor empowered to disturb or revise the constitutional questions decided by its order of November 5,

1959. Except in result, the orders were entirely different.

The order of November 5, 1959, was the final order of the final New York State Court on constitutional issues, see *Market St. Ry. v. Railroad Comm'n*, 324 U. S. 548, 551 (1945), although the case itself continued on other matters. Statutes of limitation

> are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.

Federal Trade Comm'n v. Minneapolis-Honeywell Co., 344 U. S. 206, 213 (1952). Appellant's time to appeal to this Court on federal questions began on November 5, 1959, and ended long before the petition for appeal was made. This Court, therefore, lacks jurisdiction to review the Court of Appeals order of November 5, 1959.

D. No appeal to this Court may be taken from the New York Court of Appeals order, dated April 21, 1960.

Although the appellant's petition for appeal was filed within ninety days of the second order of the New York State Court of Appeals—from April 21, 1960 to June 27, 1960—this Court has no jurisdiction to entertain the questions raised by the second order. Since all federal questions were decided by the Court of Appeals order of November 5, 1959, none were or could be raised in the order of April 21, 1960. Therefore, this Court is without jurisdiction to review the questions presented by the second order. See 28 U. S. C. §1257 (1952).

POINT II.

The appeal herein does not present a substantial federal question.

The only federal or constitutional question which appellant seeks to present relates to the "due process clause," section I of the fourteenth amendment to the Constitution of the United States.

Appellant relies on two aspects of the proceedings, claiming that one or both have been a denial of due process: A. The proceedings before the Commissioner of Education; B. The proceedings before New York Supreme Court at special term, Albany County.

A. The proceedings before the Commissioner of Education were conducted in accordance with the rules established by the Commissioner. Appellant accepted and complied with these rules. He submitted affidavits and other documentary and written proof in support of his position. He called upon the Board of Education to submit documents and records for consideration by the Commissioner of Education. The appellant was afforded an oral argument. He accepted all the benefits afforded him by the Commissioner's rules. The Commissioner of Education's resolution of a dispute, even on conflicting affidavits, does not involve a constitutional question of any kind. *Matter of O'Brien v. Commissioner of Educ.*, 4 N. Y. 2d 140 (1958), *cert. denied, sub nom. Murphy v. Commissioner of Educ.*, 361 U. S. 117 (1959).

In the *Matter of Board of Educ. of the City of New York v. Allen*, 6 N. Y. 2d 127 (1959), the New York Court of Appeals has interpreted that part of section 310 of the Education Law, which reads as follows:

> Any person conceiving himself aggrieved may appeal or petition to the commissioner of education

> who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be *final and conclusive, and not subject to question or review in any place or court whatever.* (Italics added.)

Chief Judge Conway in this case, writing for a majority of the court, states:

> If the words of section 310 were to be read literally there could be no court review whatever of the Commissioner's decisions on appeal, for the statute states that his decision "shall be final and conclusive, and not subject to question or review in any place or court whatever." However, our court has determined that the Legislature did not intend that the words are to be so read. Thus, we have said that "decisions by the Commissioner of Education are final *unless purely arbitrary.*" (*Matter of Ross v. Wilson*, 308 N. Y. 605, 608, italics supplied; *Matter of Levitch v. Board of Educ.*, 243 N. Y. 373, 375.) The term "arbitrary," standing by itself, would be quite sufficient to make it plain that only a narrow review of the Commissioner's decisions is available in the courts. In the above-cited cases we undertook to emphasize the point by employing the phrase "purely arbitrary."

The interpretation of this statute does not involve a constitutional question of any kind and is therefore binding upon the appellant here. The interpretation placed upon a state statute by the highest court of that state establishes the legislative intent and in the absence of a constitutional question finally determines the law of that state.

The record of the proceedings before the Commissioner is barren of any refusal of the appellant to abide by the rule. The record does not indicate that appellant re-

quested that the proceedings be referred by the Commissioner to the District Superintendent of Schools to conduct a hearing and to report the evidence taken at the hearing to the Commissioner as might have been done under subdivision 12 of section 2215 of the Education Law of the State of New York. The record does not show that appellant asked or demanded the right to call and examine witnesses. It does not indicate any request or demand that appellant be afforded the opportunity to cross examine any adverse witnesses. The record does not show any protest by the appellant to the method the examiner used to get at the facts. Under such circumstances and in the state of this record it has recently been stated (Van Voorhis, J., in *Matter of O'Brien, supra*), that appellant has waived any right he might have had to raise the constitutional question of due process even if one existed.

B. The proceedings before the New York Supreme Court at Special Term, Albany County (Hamm, J.), afforded appellant another opportunity for "due process." He presented his proof and called upon the Board of Education and the Commissioner of Education to present facts, records, and evidence upon which appellant relies. The Court at Special Term had the authority at that stage of the proceeding to take testimony, conduct a hearing and grant the parties the right to cross examination of witnesses. The appellant requested that this be done. The Court at Special Term concluded, after full consideration of the matter, that there was no question of fact involved. The final portion of Justice Hamm's opinion dismissing the petition reads as follows:

> The petition contains 121 allegations. There may be some with "fringe issues of fact" involved (Cf. *Matter of Badman v. Falk*, 4 A. D. 2d 149, 153), but none of them is such that its resolution in the petitioner's favor would leave no rational basis for

> the Commissioner's decision. And as to all of the issues sought to be raised by the petitioner, Mr. Justice Halpern's statement is apposite (*Matter of O'Brien v. Commissioner of Education*, 3 A. D. 2d 321, *supra*, 325): "* * * In an appropriate case in a proceeding in the nature of mandamus, the Court may direct a hearing to be held (Civ. Prac. Act, Sec. 1295; *Matter of Acuri v. Macduff*, 286 App. Div. 17, and the cases there cited). However, in order to be entitled to a hearing the petitioner must demonstrate that there is a triable issue of fact, the resolution of which in his favor would leave no rational basis for the administrative decision. This the petitioners fail to do in this case." The petition is dismissed without costs. Submit order on three days notice.

The unanimous affirmance by the Appellate Division, Third Department, of the order of the Special Term, Albany County, evidenced a concurrence by that court that no question of fact was involved. Under such circumstances and findings there was no need to set the matter down for trial, and the refusal to afford a litigant a trial of questions of fact when no material question of fact exists, is not a denial of due process. Judges are required to determine on many occasions whether or not a question of fact exists. The granting of a motion for a nonsuit, the granting of a motion for a directed verdict, the granting of a motion for summary judgment, all require a determination by the presiding judge that no question of fact exists. There is then no need to send questions to a jury, and in case of summary judgment there is no need even to have a trial at all. Such action has never been held to be unconstitutional as a denial of due process or as depriving one of a constitutional right to a jury trial.

All the issues of law including the constitutional question sought to be raised have heretofore and recently been

considered by this Court in *Murphy v. Commissioner of Educ.*, 361 U. S. 117, decided November 23, 1959, adversely to the appellant's position.

Rebuttal.

Intervenor-respondent does not question the contention that the validity of a tax on appellant's property depends on compliance with due process, but the other points raised by appellant do not involve a federal or constitutional question and have been finally resolved by the litigation and decisions in the Courts of the State of New York. The appellant, for example, does not contend that *he* was deprived of his right to vote, so there can be no question here of denial of equal protection.

The Commissioner of Education rendered a written decision containing his determination of the facts, and this constituted sufficient findings of fact as required by the law of New York. There is no requirement in New York that findings of fact be numbered or tabulated or set forth in any particular way. In any event, no federal question is involved in the manner in which facts found are to be set forth.

CONCLUSION.

The appeal should be dismissed.

1. It was not taken in time.

2. Even if the appeal had been timely taken, it should be dismissed, for

a. the record shows appellant has had his day in court and the constitutional requirements of due process have been afforded him throughout;

b. the appellant has waived any right which he might have had to call witnesses and cross examine witnesses by his failure to demand such right before the Commissioner of Education.

3. All issues of constitutionality presented by the present record have heretofore been considered by this Court and decided adversely to the contentions of appellant in *Murphy v. Commissioner of Educ.*, 361 U. S. 117 (1959).

Respectfully submitted,

MAX G. MORRIS,
Attorney for Intervenor-Respondent,
Office and P. O. Address,
South Main Street,
Manchester, New York.

HENRY W. WILLIAMS, JR.,
and
NICHOLAS E. BROWN,
Of Counsel.

APPENDIX "A"

STATE OF NEW YORK, COURT OF APPEALS,

COUNTY OF ALBANY.

IN THE MATTER
of

The Appeal of REGINALD LUSH, under Article 78 of the Civil Practice Act, to review the decision and order of the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, Respondent, holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County, in the State of New York.

PLEASE TAKE NOTICE that the petitioner-appellant, Reginald Lush, relying solely upon the question directly involving the construction of the following provisions of the Constitution of the State of New York: Article 1, Section 1; Article 1, Section 6; Article 1, Section 11; Article 2, Section 5; Article 2, Section 6; Article 2, Section 7; and the U. S. Constitution, Amendment 14, Section 1; hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered in the Office of the Clerk of the County of Albany on May 5, 1959 upon the decision of the Appellate Division, Third Department, entered in the Office of the Clerk of that court on April 23, 1959; and thereafter amended by an amended decision entered in the Office of the said clerk of that court on April 29, 1959, which affirmed the decision and order of the Special Term of Albany County, entered in the Office of the Clerk of the County of Albany on the 7th day of November, 1957, which order dismissed on the merits a petition under Article 78 of the Civil Practice Act to review a

determination of the respondent, Commissioner of Education, holding valid a special election held by the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County; and that this appeal is from each and every part of said judgment and order as well as the whole thereof.

Dated: June 2, 1959.

Yours, etc.,

FRANCIS G. HESSNEY, Esq.,
Attorney for Petitioner-Appellant,
74 South Main Street,
Canandaigua, New York.

To:

Clerk,
County of Albany.

To:

Charles A. Brind, Jr., Esq.,
Attorney for Respondent,
State Education Building,
Albany, New York.

To:

Max G. Morris, Esq.,
Attorney for Intervener,
3 South Main Street,
Manchester, New York.

Affidavit of Service.

I, HENRY W. WILLIAMS, JR., an attorney of counsel to Max G. Morris, attorney of record of the intervenor-respondent herein, depose and say that on February , 1961, I served a copy of the foregoing notice of motion to dismiss appeal by depositing it in the United States mails with first-class postage prepaid to the following counsel of record:

Charles A. Brind, Jr., Esq., Attorney for the Commissioner of Education, Respondent, State Education Building, Albany, New York.

Francis G. Hessney, Esq., Attorney for Reginald Lush, Appellant, 74 South Main Street, Canandaigua, New York.

Subscribed and sworn to before me
at Rochester, New York,
this day of February, 1961.

KREAG DONOVAN,
Notary Public in the State of New York.
Monroe County, New York.

Commission expires March 30, 1962.

JAMES R BROWNING

IN THE

Supreme Court of the United States

No. 683

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FRANCIS G. HESSNEY,
Attorney for Appellant,
74 South Main Street,
Canandaigua, New York.

BATAVIA TIMES JOB PRINTING
BATAVIA, N. Y.

IN THE

Supreme Court of the United States

No. .....

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

POINT I

The Supreme Court does have jurisdiction to entertain this appeal.

The November 5, 1959, order was not the final order of the New York State court on the issues presented, because those issues were raised again twice by the motion to appeal made to the Appellate Division, Third Department, and by

the further motion for leave to appeal to the Court of Appeals itself. This last motion was denied on April 21, 1960. The following were the issues which were timely raised in those motions for leave to appeal.

1. There is a question of law involved in that registration books were not properly prepared which resulted in a great deal of admitted confusion not only to the general public and the 59 people who actually came down to vote, but the registration clerks who selected and chose 11 out of 59 and permitted them to vote, but not the other 48, whose names were also in the registration books and were properly registered under the permanent registration law governing districts of less than 5,000. These 48 people definitely would have been more than the alleged plurality of 47 or majority of one.

2. There is a question of law as to whether voters can be compelled to register twice in one year (1956) without fair and reasonable warning from the School Board as to any procedural requirement for such alleged double registration, in view of the district being under 5,000 population and the registration books were prepared as they would be normally for such a small district.

3. There is a question of law involved as to whether a School Board can, in fact, misrepresent a taxing proposition to the public, relative to the cost of the building, the tax rates, the amount of State Aid, land site cost, and other important facts necessary for an informed public to properly judge a voting proposition, without any public hearings being held for the public to ascertain the truth.

4. There is a question of law involved as to whether the Commissioner can declare a fair election was held when one side was "frozen out" from having any inspectors of elec-

tion, registration clerks, or other election officials under Section 223 of the Election Law.

5. There is a question of law involved as to whether an election is valid when only one side is permitted to read the election results in violation of Section 261 of the Election Law.

6. There is a question of law as to whether the Commissioner can sustain an election when the votes on the voting machines are destroyed, in violation of specific sections of the law (Sections 261, 263 of the Election Law and Sections 2034, 2035 of the Education Law) prior to an appeal on the election being effectively presented.

7. The Commissioner ignored these statutory violations which permitted the election results to be wiped out in 28 days—against the express urging of the petitioner and his supporters in demanding that the Commissioner impound the machines (as is his duty).

8. There is a question of law involving the Commissioner's power to declare that a proposition had validly passed, in view of the admitted fact that the votes were destroyed in violation of the statutes.

9. There is a question of law as to whether the burden of affirmatively proving with a reasonable degree of certainty that the votes had been undisturbed and inviolate, rested with the Board of Education who seeks to sustain an election result, or as the Commissioner and Special Term state, that the burden and duty rests with the petitioner-appellant to impeach the votes which he never had a chance to see and count.

10. There is a question of law as to whether the voters truly have the right to decide a school taxing proposition or can the School Board and the Commissioner take any mani-

pulated results and accept them under their personal belief that it would be good educational policy.

11. There is a question of law as to whether the Commissioner has the right to refuse the production of public records when that power to produce lies with the Commissioner himself and the Petitioner so requests him to exercise it.

12. There is a question of law concerning the validity of the statutory provisions of the Education Law, Sections 310, 311, and the rules and regulations outlined by the Commissioner in his booklet, "The Laws and Rules of Practice", which allegedly permit the Commissioner to make oral procedural rules effectively blocking the petitioner from properly and adequately presenting all of the evidence that can be adduced; as an example, the failure to produce the registration books and the other documentary papers requested in our notice to produce which were in the exclusive custody of the School Board or the State Education Department.

13. There is a question of law as to whether a fair hearing was held when the Commissioner, at the so-called "oral" hearing, states that all he can deal with is a question of law and not of fact, in these words:

> "Dr. Brind: We have no witnesses here, and there can be no questions of credibility involved unless you have affidavits.
>
> "Dr. Allen: The only thing I can deal with is a question of law."

The above transcript, taken at the oral hearing held January 30, 1957; was made by the reporter who is now official reporter for the United States District Court for the Western District of New York.

14. There is a question of law involved with regard to the Commissioner foreclosing an adequate hearing when the

Commissioner's office has effectively arrived at an answer even dismissing the appeal before an oral hearing is held. It was admitted that prior to the oral hearing of January 30, 1957, responsible officials in the State Education Department had advised the Intervener-School Board to go ahead and sell the school bonds, because the appeal would be dismissed.

15. There is a question of law involved regarding the procedure of judicial review under Article 78 of the Civil Practice Act, in what court, and what forum, if any, may the petitioner-appellant properly secure the facts and conclusions of law that are necessary for an appellate tribunal to determine whether the Commissioner was "purely arbitrary".

And certifying that, in the opinion of the Court of Appeals, that questions of law are involved which ought to be reviewed by the Court of Appeals, together with such other and further relief as may be proper.

Rebuttal

The appellant herein had filed an application to reopen the entire proceedings on September 19, 1960. It took the Commissioner four months to reject this application on the ground:

> "I am unable to find that there is any material evidence not previously available which would change the decision or which could not have been utilized at the time of the original submission of this appeal."

This simply does not square with the facts which are partially admitted by the Commissioner himself as to making rules which effectively block the petitioner from presenting evidence. The problem can be more fully stated by an

elaboration of the question of the reopening of this appeal noted on page 8 of the respondent's brief.

The evidence submitted was proof from one of the leading members of the State Education Department itself that this taxing proposition to build a school under the existing Department's Master Plan would be subjected to conversion within five to ten years to an entirely different type of school —probably an elementary school. This would necessitate the floating of a second bond issue to permit its conversion. This is entirely different from using a building to add on additional facilities later. It means that the building's nature, character and purpose would be completely changed, contrary to an explicit statute, Volume VI New York Consolidated Laws, Service Local Finance Law, Section 11.

The appellant made every effort to make it available by his notice to produce (Exhibit 5 of the Record) and his prior demands to have testimony taken. However the Commissioner by his peculiar practice prevented appellant from producing this evidence which was exclusively within the Department's knowledge and which could not have been utilized by appellant because of the very act of the Education Department preventing the appellant from knowing anything about it.

It is submitted that it was a denial of due process for this taxpayer and the electorate in general to be deprived of the essential knowledge that the purpose of the taxing proposition was not as alleged, to build a completely integrated school system to be used for 30 years, but for perhaps about five to ten years and that the electorate, therefore, would have demanded that a more realistic, useful and needed building be built now.

Also, on September 19, 1960, the Commissioner's brief states that this appellant presented a petition to the

school board by "several persons." These "several persons" were 582 voters in this small district which would be the equivalent of approximately 3,000,000 people in New York City, demanding they wanted an opportunity to rectify a terrible mistake based on an election full of irregularities, misinformation and confusion.

These voters in this small isolated district are trying to prevent the foisting of a second-rate educational system upon them and their children (reluctantly admitted by the State Education Department) at a confiscatory cost.

It follows that taxpayers are being deprived of their constitutional rights when an administrator sanctions an election result when the votes were destroyed contrary to law.

CONCLUSION

It is respectfully urged that the appeal herein should be granted.

Respectfully submitted,

FRANCIS G. HESSNEY,
Attorney for Appellant,
74 South Main Street,
Canandaigua, New York.